and the cases of *Lanark* v. *Dougherty*, and *Coal Co.* v. *Holmquist* (above cited), reported since the writing of the note on this subject, are undoubtedly, as Mr. Prentice suggests, to be regarded as rendering the doctrine of Comparative Negligence obsolete and no longer law.

RICE *v.* D'ARVILLE AND JOHNSON *v.* GIRDWOOD AFFIRMED. — *Rice* v. *D'Arville*, 8 HARVARD LAW REVIEW, 172, has been affirmed by the Supreme Court of Massachusetts, which seems explicitly to deny, as Mr. Justice Holmes did below, the English case of *Lumley* v. *Wagner*, 1 De G. M. & G. 604. But the main ground of the decision, so far as the incomplete report at hand shows, is that the plaintiff was unable to do his part of the affirmative contract, and therefore not entitled to equitable relief in the negative branch. The decision above is then by no means so far-reaching as the principle laid down below.

Johnson v. *Girdwood*, 28 N. Y. Suppl. 151, commented on 8 HARVARD LAW REVIEW, 222 ("Can one cheated into pleading guilty maintain an action for it?"), had been affirmed in the Court of Appeal, without opinion or reasons for the decision, on October 9. It is to be regretted that the commendable zeal of that court to keep up with its docket should deprive the profession of discussion on a case of the first impression with such novel facts and raising so interesting a question.

RECENT CASES.

AGENCY — EMPLOYER'S STATUTORY LIABILITY — WAYS, WORKS, AND MACHINERY. — *Held*, that loaded freight cars received by a railroad company from and belonging to another road, are part of "the ways, works, and machinery" of the railroad, within the meaning of a statute similar to the English Employer's Liability Act. *Bowers* v. *Connecticut River R. R. Co.*, 38 N. E. Rep. 508 (Mass.).

While this case turns upon the construction of a statute, yet it is interesting because of the prevalence of statutes of this kind. A different construction was given the statute on facts which are hardly distinguishable in *Coffee* v. *R. R. Co.*, 155 Mass. 21, where it was held that empty cars belonging to another company and being returned to that company by the defendant, were not part of "the ways, works, and machinery" of the defendant. The point is now settled in Massachusetts in accordance with the principal case by St. 1893, c. 359, which expressly provides that any car in the use of, or in the possession of a railroad company, shall be considered a part of its ways, works and machinery.

AGENCY — PAROL AUTHORITY. — A Statute of Illinois provides that city councils should allow street railroads to be built only when the land-owners petition for such railroad. There was a petition in this case and the city council granted permission to the defendant railway company to build a line. Plaintiff now seeks to enjoin the building of it on the ground that the names of some of the land-owners were signed by agents, as appears on the face of the petition, and that the authority does not appear. The theory was that the authority had to be in writing. *Held*, a parol authority to sign was good, and injunction will not be granted. *Tibbets* v. *West and South Towns St. Ry. Co.*, 38 N. E. Rep. 664 (Ill.).

In Illinois an authority to sell or lease lands must be in writing, and the argument of the counsel for plaintiff was that practically land was sold here so the petition could be signed only by the owner, or an agent authorized by writing. The court answered that "there was nothing in the statute changing the common-law rule by which an agent may sign the name of his principal to a writing, under an authority not in writing." They said the fee of the street belonged to the city of Chicago, and that the petitions did not operate as a grant anyway.

AGENCY — RATIFICATION BY PRINCIPAL NON-EXISTING AT DATE OF CONTRACT. — One of the promoters of defendant corporation contracted with plaintiff on behalf of

defendant, to pay plaintiff $1,000 00 for services to be rendered the corporation. The contract was entered into before the corporation had come into existence. The promoter afterwards became president of the corporation and ratified the contract, it being within the scope of his authority to make or ratify contracts of this nature. *Held*, that such ratification made the contract binding upon defendant, Gray and Fitch, JJ., dissenting. *Oakes* v. *Cattaraugus Water Co.*, 38 N. E. Rep. 461 (N. Y.).

This decision entirely disregards the established rule of law that acts done on behalf of a non-existing principal cannot afterwards be ratified by that principal. The minority, however, stand by the doctrine. Technically, the established rule cannot be gainsaid, for the ratification relating back to the time when there was no principal, seems an absurdity. But practically it has often been necessary for the courts to look behind the corporation and at the stockholders, and it would not require such a very great stretch to do so in this case. The body of men who form the corporation are in existence at the date of the contract, and are acting in order to bind themselves, only under another name, that is, the name of the corporation. Is it not better then to say that the court in a case of this kind will look behind the corporate entity and at the real principals, thus avoiding technical rules, effectuating the intention of the parties, and bringing about more substantial justice? See 1 Morawetz Private Corporations, §§ 547-549.

BILLS AND NOTES — PROMISSORY NOTE — GARNISHMENT. — The maker of a note agreed to pay a certain commission if the note was not paid at maturity and was collected by an attorney. The maker was garnished in an action against the payee, and while the garnishment was still pending, the note fell due. Immediately after the maker's discharge, consequent upon the dismissal of the suit against the payee, he paid the principal and interest. *Held*, that these facts were no defence in this action to recover the commission for non-payment of the note at maturity. *Brahan* v. *The First Nat. Bank of Clarksville*, 16 So. Rep. 203 (Miss.).

It is settled in Mississippi by the cases of *Work* v. *Glaskins*, 33 Miss. 539, and *Smith* v. *Bank*, 60 Miss. 69, that a garnishee is liable for interest accruing *pendente lite*, and that to avoid such liability he must pay the money into court. The court decide this case on the same principle, and hold that, if defendant wished to escape liability for these commissions, he should have paid the notes, as they fell due, into court, suggesting the fact of their negotiation, if known to him.

CARRIERS — RIGHT TO STOP-OVER PRIVILEGES ON AN UNLIMITED TICKET. — Plaintiff purchased an unlimited ticket from S. to A., and upon giving it up, demanded from the conductor a stop-over check, as he wished to leave the train at O., an intermediate station. This was refused him, but he alighted at O., and resuming his journey on the same day by a subsequent train, was ejected for refusal to pay his fare. *Held*, under § 490 of the civil code of California, allowing the purchaser of a railway ticket to ride from the station at which the ticket was bought to the station of destination, "and from any intermediate station to the station of destination," the plaintiff has a right to stop off at any intermediate station, and resume his journey, without payment of additional fare. *Robinson* v. *S. P. Ry.*, 38 Pac. Rep. 94 (Cal.).

It is perfectly well settled that by the common law the purchaser of a railway ticket has no such privilege as is allowed by the decision in this case. Whatever rights a ticket confers are exhausted when the passenger is received on the train. His ticket is used as soon as the train starts, and may be thereafter demanded and cancelled. *Auerbach* v. *Ry.*, 89 N. Y. 281; *Evans* v. *Ry.*, 11 Mo. Ap. 463. The performance on the part of the railway to which the passenger is entitled is a unity, and an unbroken series of authorities deny his right to force upon it the burden of carrying him from place to place between intermediate stations on a single ticket covering the whole distance travelled. *Cheney* v. *Ry.*, 11 Met. 121; *Vankirk* v. *Ry.*, 76 Pa. St. 66; *Wyman* v. *Ry.*, 34 Minn. 210; *Roberts* v. *Koehler*, 30 Fed. Rep. 94; *Cody* v. *Ry.*, 4 Sawy. 114.

It would seem that if the legislature of California had intended to make such a sweeping change as is involved in endowing all tickets with stop-over privileges they would have used more explicit language. Such, however, under the decision of the court is the effect of the section in question whatever the intention may have been when it was enacted.

CONSTITUTIONAL LAW — DESCENT AND DISTRIBUTION — COLLATERAL INHERITANCE TAX. — While the tax imposed by St. 1891, c. 425, on inheritances, is in form a tax on property, in effect it is an excise on the privilege of transmitting property in this way. This privilege is a taxable commodity within the meaning of the Constitution, and an excise laid upon it is not unreasonable and void, because certain estates are exempt, nor because kindred in the direct line are relieved from payment *Minot et al.* v. *Winthrop et al.*, 38 N. E. Rep. 512 (Mass.). See Notes HARVARD LAW REVIEW, Vol. VIII. p. 226.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — PRIVILEGES AND IMMUNITIES. — To protect the people of the State from false representations, a Statute of Minnesota required every vendor of nursery stocks, grown outside the State, to file an affidavit, give bond, and comply with other restrictive regulations, none of which were imposed on the vendors of similar stock grown in the State. *Held*, — such restrictions upon the sale of a sound foreign product interfere with the power of Congress to regulate interstate commerce (art. 1, § 8, cl. 3), and deprives the dealer of his privileges and immunities under art. 4, § 2 of the Constitution. *In re Schechter*, 63 Fed. Rep. 695.

In holding the statute unconstitutional on the first ground, the court is simply following *Welton* v. *Missouri*, 91 U. S. 275, and *Cook* v. *Pennsylvania*, 97 U. S. 566, and earlier cases to the effect that the power of Congress over the transportation of a commodity continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character; but the second ground of the decision may be questioned, as the statute apparently made no discrimination between the citizens of Minnesota and those of other States, and the only explanation would seem to be that the court believed its position would be justified by the practical effect of such legislation.

CONSTITUTIONAL LAW — OBJECTS OF TAXATION — JUDICIAL QUESTION. — In satisfaction of a claim by the relator against a township for a certain sum paid over to his successor in office by mistake, the legislature enacted that the respondent should levy upon the taxable property in said township for the purpose of refunding the said sum with interest. In error, upon the award of a writ of mandamus to compel the levy, it was *held* that the enactment was constitutional if supported by a sufficient moral or legal obligation; but when the facts out of which such obligation is claimed to arise, are disputed, the controversy falls within the province of the court. *Board of Education* v. *State ex rel. Lindsay*, 38 N. E. Rep. 614 (Oh.).

The limitations which the court here places upon the power of the legislature to bind a party against whom it has allowed a claim, and the tests here adopted, are recognized as established principles. (Cooley's Con. Lim. 6th ed. pp. 286, 599; 25 Am. & Eng. Ency. 89, 90.) Yet the court will view the action of the legislature in as favorable light as possible, and be slow to declare that that body has passed the boundary of its power, unless the absence of all possible grounds is clear and palpable.

CONTRACTS — JOINT VENTURE IN PURCHASE AND SALE OF LANDS — ACTION FOR PROFITS ON REFUSAL TO SELL. — Plaintiff entered into a contract with defendants in June, 1882, to purchase timber-lands for them. He was to receive for his services a certain percentage of the profits arising from the sale of the lands, after deducting the amount of the taxes and interest. The defendants expressly reserved the right of determining the time and terms of the sale. Plaintiff purchased accordingly. In August, 1883, defendants refused an offer for the lands which would have netted them a return of 300 per cent. Plaintiff demanded his share of the profits based upon such offer, but was refused, and action was brought, the verdict being in his favor. On error, Knowles, J., *held* that, notwithstanding the express reservation, the contract was not to be so construed as to leave it to the option of the defendants whether or not a sale should ever take place. In such contract as the present, the law requires that a reasonable time for the sale be fixed, and that a reasonable price be decided upon. If the party having the discretion fails to conform to these requirements, he becomes liable. *Nunez* v. *Dautel*, 19 Wall. 560, which cites *Hicks* v. *Shouse*, 17 B. Mon. 487; and *Ubsdell* v. *Cunningham*, 22 Mo. 124. The learned judge seemed to think that the price offered had been admitted to be the market value of the land, thus fixing the measure of plaintiff's damages as there was no question but that a reasonable time for making the sale had elapsed. He was for affirming the judgment. Gilbert, J. (dissenting), thought that the defendants were under no obligation to accept the offer. He admitted that the plaintiff might bring action if the lands remained unsold after a reasonable time, or if the profits had been ascertained as by accounting or admission, but thought that nothing of the kind had occurred. The two members of the court differing, the verdict stood. The learned judges seem to differ rather as to the construction to be placed upon the facts than in their views of the principle involved. *Noyes* v. *Barnard*, 63 Fed. Rep. 782.

CONTRACTS — RESTRAINT OF TRADE — UNLIMITED AS TO SPACE. — A patentee and manufacturer of guns and ammunition for purposes of war covenanted with a company to which his patents and business had been transferred that he would not for twenty-five years engage, either directly or indirectly, in the business of a manufacturer of guns or ammunition. *Held*, the covenant is not one in restraint of trade, and will be enforced by injunction. *Nordenfelt* v. *Maxim-Nordenfelt Co.*, L. R. [1894] 5 App. Cas. 535.

The English law has been steadily tending of late years toward the abandonment of the old rule that every covenant not to engage in a particular trade was void if unlimited as to space. Pollock on Contracts, p. 315. This case definitely discards the old rule, and lays down as the test of validity: What is a reasonable restraint with reference to the particular case? The opinions of the judges are interesting because they show clearly the gradual development of the law as to such contracts, and the steadily increasing tendency toward the result now finally determined upon by the House of Lords. See NOTES.

CORPORATIONS — ULTRA VIRES ACTS. — *Held*, that the alienation by a corporation of a pipe-line in which a great part of its capital was invested, and the possession of which was necessary for the carrying on of its business, was *ultra vires*, and might be restrained at the suit of a single stockholder. *Carter* v. *Producers' & Refiners' Oil Co.*, 30 Atl. Rep. 391 (Pa.).

The above decision would seem to be correct. It has always been held that alienation by a railroad company of its road-bed is *ultra vires*, and the present case is in line with that.

CRIMINAL LAW — EXTRADITION — CONVICTION OF CRIME NOT SPECIFIED. — *Held*, under the treaty between the United States and Great Britain, which provides for the extradition of persons "charged with the crime of murder or assault with intent to commit murder," a person extradited on the charge of "assault with intent to commit murder" cannot be convicted of an assault with intent to do great bodily harm. *People ex rel. Young* v. *Stout*, 30 N. Y. Supp. 898.

It was urged that a man could be extradited for one offence and convicted of another minor offence included within the one for which he was extradited. In this case, however, the prisoner could not have been extradited at all for the minor offence of assault with intent to commit great bodily harm. The court say that to allow a conviction for the minor offence under these circumstances would be a breach of faith and a violation of the treaty between Great Britain and the United States by which extradition for the major offence was made possible. The precise question raised here is thought to be rather a novel one.

CRIMINAL LAW — HOMICIDE — INSANITY — IRRESISTIBLE IMPULSE. — Instructions *held* correct, that if defendant, by reason of insanity, was rendered incapable of distinguishing right from wrong as applied to his act, *or* if by reason of an insane delusion he was deprived of his will-power, and was compelled by an irresistible impulse to do the act, then he is excused. *Wilcox* v. *State*, 28 S. W. Rep. 312 (Tenn.).

This, it is submitted, is the correct view. *Parsons* v. *State*, 81 Ala. 577. The decisions in this country are in conflict as to whether an irresistible impulse will excuse from crime, when defendant knew the difference between right and wrong. Beale's Cases on Criminal Law, 254, Note on the Test of Insanity. But if the impulse was really irresistible, and was caused by a diseased state of mind, there seems to be no good reason why defendant should be held responsible, even though he knew right from wrong, when he was unable to choose between right and wrong. See, *contra*, 2 HARVARD LAW REVIEW, 387.

CRIMINAL LAW — HOMICIDE — SELF-DEFENCE. — The defendant, knowing that his life had been threatened, armed himself and went where deceased was. *Held*, that although he went in the expectation of being attacked, he was not deprived of the right to kill in self-defence. *State* v. *Evans*, 28 S. W. Rep. 8 (Mo.). See NOTES.

CRIMINAL LAW — LIBEL — RESPONSIBILITY OF A NEWSPAPER PUBLISHER. — In a prosecution for libel against the publisher of a newspaper, *held*, that it is no defence for the publisher to show that the article was published in his paper without his consent and knowledge, unless it further appears that the publication did not occur through any negligence or want of ordinary care on his part. *State* v. *Mason*, 38 Pac. 138 (Ore.).

The publisher gives his agents the power to publish articles, and if through his want of care such articles are published, he should be held criminally liable. Mechem on Agency, § 746. The case follows *Commonwealth* v. *Morgan*, 107 Mass. 199; and is law in England by Statute 6 and 7 Vict. c. 96. The English law, before the statute, was even more severe. *Rex* v. *Gutch*, 1 Moody and M. 433. See, also, 3 Albany Law Journal, 46; 64 Law Times, 95.

EVIDENCE — JUDICIAL NOTICE. — Testimony was given that a crime was committed in Monitean County, three miles from California. *Held*, this is evidence that the crime was committed in Missouri, for the court will take judicial notice that Moniteau County is one of the counties of Missouri, and that California is a town in Moniteau County. *State* v. *Pennington*, 27 S. W. Rep. 1106 (Mo.).

In this country, if a place is situated within a given jurisdiction, the court of that

jurisdiction has invariably taken judicial notice of the fact. *Commonwealth* v. *Desmond*, 103 Mass. 445; *Solyer* v. *Romanet*, 52 Tex. 562; *Smitha* v. *Flournoy's Adm'r*, 47 Ala. 345 at 367; *Ala. Gold Life Ins. Co.* v. *Cobb*, 57 Ala. 457. But where the place is not within their jurisdiction, the courts have declined to take judicial notice that the place referred to is one place of the name rather than another. *Andrews* v. *Hoxie*, 5 Tex. 171; *Riggin* v. *Collier*, 6 Mo. 568. These latter two cases follow the English case of *Kearney* v. *King*, 2 B. & Ald. 301. See also *Brune* v. *Thompson*, 2 Q. B. 789. In *Kearney* v. *King*, *supra*, it was held that the court could not take judicial notice that a bill headed "Dublin, May 1, 1816," was drawn in Dublin, Ireland, because there may be other Dublins in the world. The same reason might be applied where the place in question is within the jurisdiction of the court, but as the subject of judicial notice is not at all technical, and as it lies within the discretion of the court to take it or not, and as it is not final if a party gives evidence that some other place is meant, there is ample justification for the above distinction. Of course the courts will more readily take judicial notice that a certain place is meant, if there are other circumstances indicating that fact, as there usually are when the place is within their own jurisdiction.

PARTNERSHIP — ATTACHMENT AND SERVICE. — A partnership having a usual place of business in Ohio, and formed for the purpose of carrying on business there, consisted entirely of non-resident partners. In an action against it: *Held* (*a*), that since the partnership as such had no separate existence, its property could be attached as that of the partners, under the Ohio law allowing attachment of the property of non-residents; (*b*) that a writ made out in the firm name, served on the firm as such at its usual place of business, was good. *Byers* v. *Schlupe*, 38 N. E. Rep. 117 (Ohio).

It would seem that the general reasons for allowing more stringent process against non-residents do not apply to a firm doing business within the State, having all its assets there, and, as the second holding shows, fully amenable to service.

The second holding is based upon § 5011 Rev. Stat. of Ohio, which provides that "a partnership may sue or be sued by the ordinary name which it has assumed; and in such case it shall not be necessary to allege or prove the names of the individual members thereof." The statute is so complete a recognition by the legislature of the separate existence of the firm that it jars unpleasantly with the refusal of the court to recognize anything of the sort.

PARTNERSHIP — INFANCY OF PARTNER — JUDGMENT AGAINST FIRM. — *Held*, that in a suit against a firm, of which one of the partners was an infant, judgment should be rendered against the firm "other than the infant" and that bankruptcy proceedings should also be taken against the firm "other than the infant." *Lovell and Christmas* v. *Beauchamp*, L. R. [1894] 5 App. Cas. 607.

This case treats the partnership as an entity to a certain extent, and gives judgment against it as such, thus making the firm assets pay the firm debts, though one of the partners is an infant. This is reaching the right result in the right way. In contrast with this case is *Whittimore* v. *Elliott*, 7 Hun, 518. There the right result was reached in the wrong way. Judgment was rendered against the adult members of the firm only, but execution was allowed to be taken out on all the firm property. To prevent great injustice, the common law had to give way somewhere, and the court, rather than discard the common-law theory of a partnership, allowed execution to be taken out which did not follow the judgment, but was against the property of those against whom no judgment had been rendered. The result in the principal case was made possible by the English statute allowing partnerships to sue and be sued in the firm name, and this now seems the only way to get rid of the common-law notion of a partnership and make it, what it is really treated as being by merchants and partners themselves, a legal entity.

PERSONS — BREACH OF PROMISE — FRAUD. — As a defence to an action for breach of promise, evidence was given that plaintiff had told defendant that she had obtained a divorce from her former husband, but did not mention the fact that he also had obtained a divorce from her on the ground that she had a violent temper and had treated him with such cruelty that his health had been injured. She told defendant, also, that she was a descendant of the finest white families in Charleston, but omitted to state that her mother married a colored barber after the death of her first husband, and that this negro was her reputed father. *Held*, that these facts constituted a good defence. *Van Houten* v. *Morse*, 38 N. E. Rep. 705 (Mass.).

The court expressly says that it is not the duty of a woman, before accepting an offer of marriage, to tell all the history of her family and herself, but decides the case on the ground that it was fraud for her to narrate part of such history and suppress the rest, so that plaintiff was deceived as to the kind of woman he was promising to marry.

The agreement to marry differs very often from other contracts in that it looks to the creation of a status; so, in many instances, the ordinary rules of contracts cannot be applied. Whenever it is possible to apply them, however, without doing great injustice, they should be; and in this case we find such an application to a state of facts rather novel. Mr. Bishop, in his Marriage, Divorce, and Separation, Vol. II. § 224, says: "Any conduct by one of the parties amounting to actual fraud will justify the other, who has been entrapped by it, in withdrawing from the agreement." This general proposition, when applied to the facts of this case, would seem to justify plaintiff in refusing to perform his contract, as a partial statement of facts is often as deceptive as a misstatement.

PERSONS — DIVORCE — COLLUSION. — The respondent and co-respondent committed adultery without the connivance of the husband. The wife had some property, and the petitioner desired to have this settled on their child after the life of the respondent. He therefore agreed to bring suit for divorce, and ask for no damages if the wife would so settle the money. The wife also deposited £100 to pay the costs of petitioner. As a result of this agreement, the suit was begun, and a decree *nisi* obtained. The Queen's Proctor here intervenes on the ground of collusion. In his opinion the learned President of the Probate, &c., Division says, "there was no collusion to present to the court false facts in proof of adultery;" and "it was not shown that there were any specific facts material to defence or recrimination which might have been brought forward by the wife." The question, therefore, came squarely before the court whether collusion means an agreement to deceive the court by putting in false matter, or suppressing material matter, or whether an agreement merely as to the prosecution of the suit and costs was collusion. The court *held* that collusion is to have the broader meaning, and that there was collusion in this case. So the Queen's Proctor was entitled to succeed. *Churchward* v. *Churchward and Holliday*, 11 *The Times* Law Rep. 69.

The English authorities are very carefully dealt with by Sir Francis Jeune, who comes to the conclusion that there are two or three cases in point. *Lloyd* v. *Lloyd*, 1 Swab. & T. 567, is very like the present case, — the only difference being that there an agreement as to the procurement of evidence existed. In the principal case the matter is discussed on theory very ably. The learned President says: "He [petitioner] appears before the court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is subjecting his rights to pecuniary stipulation, he raises more than a doubt whether, in the words of Lord Stowell, he has received a real injury and *bona fide* seeks relief.

Mr. Bishop arrives at the same result. 2 Bish. Mar. and Div. § 28, *a*.

PERSONS — USE OF WIFE'S SEPARATE ESTATE — LIABILITY OF HUSBAND. — Where a wife allowed her husband to take legacies to her separate use and spend them in the support of the family, without any understanding whether they were a gift or a loan, *held*, that she might recover the amount taken. Owing to the peculiar relation of husband and wife the inference arising from a transfer of her separate property to him is that a trust was intended. The onus is on the party wishing to prove a gift. *Hammond* v. *Bledsoe*, 38 N. E. Rep. 530 (Ind.).

The court distinguishes between a use of the principal and of the income of the separate estate, saying that in the latter case the court will presume a gift. This distinction runs through the books, appearing at least as early as 2 P. Wms. 82. The reason for it seems to be that originally the principal of the separate estate was in the hands of a trustee, who might be the husband, and he might dispose of the property without his wife's knowledge, so that it would have been unjust to presume that she consented; as to the income, however, she knew when it became due, and if she quietly allowed her husband to keep it, her consent might fairly be presumed. The reason for this distinction is past. A married woman may hold property at law; as in the principal case she may take actual possession of it; if after that she hand any of it over to her husband, whether principal or interest, may not the courts fairly presume that she intended to make a gift?

PROPERTY — EQUITY — CANCELLATION OF A DEED. — Where a grantor delivers a deed to the grantee without consideration, on the understanding that no title is to pass until certain security is given in return. *Held*, there is no valid delivery of the deed, and the grantor may obtain cancellation of the deed at any time before such security is given. *Rountree* v. *Smith*, 38 N. E. Rep. 680 (Ill.).

The fundamental assumption upon which this case is decided is erroneous, if the decision is correctly reported. The exact words of the decree are not given, but the idea of a conditional delivery in escrow to a grantee is opposed to the whole spirit of the law. The authorities upon which the Illinois court rely for this peculiar decision

are all to the effect that delivery is necessary to the validity of a deed; from which premise they conclude that there may be a delivery conditioned on the return of security; that as this was not done the title never passed from the grantor. Hence the deeds were merely a cloud on the title, and should properly be cancelled by decree of a court of equity. There is undoubtedly a remedy by decree in such a juncture; but it is not found in assimilating the procedure where real property is involved to that in vogue in cases of written contracts. These may be delivered up and cancelled. But it would seem that the proper decree in the principal case would be to reconvey, or that the grantee furnish such security as had been agreed between the parties.

PROPERTY — EXCEPTION IN GRANT — FUTURE ESTATE. — W. H. M. conveyed lands to one H. The deed contained the following clause: "Reserving unto said W. H. M. and E. M. M. a life lease of said above-described premises, for and during the life of each of them." The question was what interest E. M. M. (plaintiff), who was the daughter of W. H., acquired by this clause, she being a stranger to the deed. *Held*, a "reservation" in favor of a stranger to the instrument is invalid as a reservation, yet in order to effectuate the intention of the grantor such a reservation has uniformly been treated as "excepting" from the grant the thing reserved. The language here used must be treated as excepting from the grant the use, &c. of the land conveyed during the lives of both father and daughter, and at the death of the father the right to that use for the unexpired portion of the period must be held to have descended to the heirs of W. H. M., of whom the petitioner is one. *Martin* v. *Cook*, 60 N. W. Rep. 679 (Mich.).

The purpose of the clause in this deed is clearly to create a future estate in fee. That such estate could not be created by a common-law conveyance is of course clear, on account of the impossibility of livery of seisin. This difficulty, however, may be overcome by treating this conveyance as a bargain and sale executed by the Statute of Uses (2 How. Ann. Stat. chap. 214, § 5565), inasmuch as there appears to have been a consideration paid sufficient to raise a use. A good case on this point is *Rogers* v. *Eagle Fire Company*, 9 Wend. 611. The court in the principal case do not discuss this point at all, though it seems the only ground on which the desired result can be attained. The court devote most of the opinion to deciding that technical words of reservation will not prevent the clause from being treated as an exception if such appears to have been the intention of the parties. It would seem that this is perfectly settled on principle and authority. In support of the proposition that this has not been confined to cases where the reservation had been previously carved out, the court cite several cases of such exceptions; they refer mostly, however, to personalty, and for this reason do not seem precisely in point, as there is no difficulty about creating future estates in personal property. The decision is sound, but should be supported on the grounds suggested.

PROPERTY — JOINT POWER OF APPOINTMENT — REVOCATION BY SURVIVOR. — By a marriage settlement, funds were settled upon trust for the children of the marriage in such shares and in such manner as the husband and wife during their joint lives by deed, with or without power of revocation and new appointment, should appoint; and in default and subject to such joint appointment, then as the survivor of them should by deed, with or without power of revocation and new appointment, or by will appoint. The husband and wife made a joint appointment, with a proviso that the appointment thereby made was made "subject to the power of revocation and new appointment mentioned in the settlement." After the death of the wife, the husband executed a deed revoking the joint appointment, and making a new appointment of the fund. *Held*, that the husband and wife had power in their joint appointment to reserve a power of revocation and new appointment to the survivor, and that such power was effectually reserved in the joint appointment. *In Re Harding*, L. R. [1894] 3 Ch. D. 315.

This is a question of construction, and the court follow the rule laid down by Lord Kenyon in *Brudenell* v. *Elwes*, 1 East, 442. Lord St. Leonards states it as follows: "If a particular power is given to two persons or *the survivor of them*, with or without power of revocation, they may execute a *joint* appointment and reserve a power to the *survivor* to revoke and appoint again. The argument against the validity of the power of revocation to the survivor was, that the original power did not authorize a joint appointment to be defeated by any but a joint revocation. But the joint appointment is allowed to be superseded by the revocation of the survivor." Sugden on Powers, 8th ed., 364, § 6.

PUBLIC SCHOOLS — SECTARIAN TEACHING. — Bill in equity to restrain school directors from employing as teachers in the public schools nuns of the Sisterhood of St. Joseph, a religious society of the Roman Catholic Church, on the ground that their wearing the distinctive sectarian garb, crucifixes and rosaries of their order, during

school hours was sectarian teaching. *Held*, that in the absence of proof that religious sectarian instruction was imparted, or religious sectarian exercises engaged in, the "Sisters" cannot be restrained by injunction from teaching in the distinctive garb and insignia of their order, nor the school directors from employing them in that capacity. *Hysong et al.* v. *School District of Gallitzin Borough et al.*, 30 Atl. Rep. 482 (Pa.), Williams, J., dissenting.

It is difficult to see how any other conclusion could have been reached in this case. "The dress," said Dean, J., "is but the announcement of a fact — that the wearer holds a particular religious belief." To have decided that it was more, and that as a matter of law it was sectarian "teaching," would have been the result of great refinement. The court was right in refusing to give that word a meaning wholly unusual and extraordinary. Reading from the Scriptures in the public schools has been considered in Maine, Massachusetts, Illinois, and Iowa as non-sectarian. 21 Am. & Eng. Ency., p. 775.

QUASI-CONTRACTS — RECOVERY FOR WORK DONE WITHOUT REQUEST. — The defendant by mistake cut logs on the plaintiff's land, and transported them to a place where there was a ready market. Plaintiff took possession, and brought an action for damages for cutting other logs. *Held*, that defendant could not set up a claim for the enhanced value of the logs transported. *Gaskins* v. *Davis*, 20 S. E. Rep. 188 (N. C.). See NOTES

QUASI-CONTRACT — WILFUL BREACH OF CONTRACT — NO RECOVERY ON QUANTUM MERUIT. — Plaintiffs made an oral agreement with defendant, whereby plaintiffs agreed to furnish all the granite for defendant's house for $10,000. After having furnished something over one-half of the necessary stone, they abandoned the contract, and now sue on *quantum meruit* for labor and materials. *Held*, that plaintiffs cannot recover. *Cohn et al.* v. *Plumer*, 60 N. W. Rep. 1,000 (Wis.).

The decision in this case is in conformity with the great weight of authority. In England, *Collins* v. *Stimpson*, 11 Q. B. Div. 142, in Massachusetts, *Hapgood* v. *Shaw*, 105 Mass. 276, in New York, *Cullen* v. *National Roofing Co.*, 114 N. Y. 45, and in many other jurisdictions (Keener, Qu. Cont. 215, *n.* 2) it is generally held that if plaintiff has wilfully refused to perform the conditions of a contract, he cannot recover for the benefits which the defendant has received by the partial performance. In New Hampshire, *Britton* v. *Turner*, 6 N. H. 481, the plaintiff may recover, and this doctrine prevails in Iowa, Indiana, Kansas, Nebraska, North Carolina, and Texas (Keener Qu. Cont. 218, *n.* 2). In Missouri, the rule is peculiar, for although the doctrine of the principal case is generally followed, *Gruetzner* v. *Ande Furniture Co.*, 28 Mo. App. 263, yet plaintiff may recover in cases of building contracts. *Gregg* v. *Dunn*, 38 Mo. App. 283.

In cases of this kind the courts have not noticed any distinction between contracts where the broken condition is express, and where it is simply implied; and yet it would seem that such a distinction might well be made. Where an express condition is introduced into a contract of this kind, it is put in for the express purpose of guarding against a wilful breach, such must be the intention of the parties in nearly all cases; therefore, to allow a recovery in *quasi*-contract would be, under such conditions, quite useless; in short, there are no equitable grounds on which plaintiff can claim relief In the case of an implied condition, however, there is a difference. An implied condition is, strictly, nothing more than an equitable excuse for not having performed; the whole question therefor is equitable, and is reduced to determining whether, even in the case of a wilful breach, it is just that plaintiff should not be allowed to recover for benefits conferred on the defendant; and it is submitted that it is not just, and that in such cases a recovery should be allowed.

TORTS — DANGEROUS PREMISES. — On demurrer to a declaration stating that the defendant invited and induced the public to use a path over his premises, near a storehouse; that the storehouse burned down, leaving a cistern exposed, which the defendant kept guarded until it caved in, when he removed the guards, and the plaintiff using the path, fell into the cistern; it is *held*, that a good cause of action is stated. *Lepuick* v. *Gaddis*, 16 So. Rep. 213 (Miss.).

The declaration alleges an invitation by the defendant to the public to use his premises, but it would seem really to be a license only. The court, also, says that "implied invitation" imports knowledge by the defendant of the probable use of his property, so situated as to be open to use by the plaintiff. This language, it is submitted, would include a trespasser if the likelihood of trespass were known to the owner, and is quite too broad. A license does not cease to be a license merely because it is intended to be used, and it entails a different duty upon the owner than an implied invitation. However, the result reached would seem to be right, the proper ground for the decision

being that though the plaintiff was a mere licensee, the defendant was still liable for making the premises more dangerous without notice.

TORTS — DECEIT — MEANS OF KNOWLEDGE. — Action for deceit in the sale of land. The court *held*, that it was for the jury to say whether plaintiff was or was not foolish in relying on defendant's statements. *Brady* v. *Finn*, 38 N. E. Rep. 506 (Mass.).

The court assume that plaintiff and defendant had an equal chance of finding out the truth of the representations, which assumption seems incorrect. The land was in a remote and inaccessible town, and of course the owner knew much more about the land than the stranger. But assuming that plaintiff could have informed himself in regard to the land as easily as defendant, was it necessary to leave the question of plaintiff's negligence to the jury, or to discuss it? Negligence cannot exist unless there is a duty on the part of plaintiff to act or forbear. Is there any more duty to use due care before acting on a false representation made with knowledge of its falsity and intending to deceive, than to use such care in avoiding or jumping out of the way of a man who intentionally hits or shoots at you? It is submitted that there is not. "No man can complain that another has relied too implicitly on the truth of what he himself stated." Kerr on Fraud, p. 81. "It is no excuse for, nor does it lie in the mouth of the defendant to aver, that plaintiff might have discovered the wrong and prevented its accomplishment, had he exercised watchfulness, because this is equivalent to saying, 'You trusted me, therefore I had the right to betray you.'" *Pomeroy* v. *Benton*, 57 Mo. 531. To the same effect, 57 Mo. 478; 2 Bish. New Cr. Law, §§ 433–436 and 464. Bigelow on Fraud, pp. 522, 523, and 528. 121 Ind. 191, and 8 HARVARD LAW REVIEW, 63.

TORTS — INJURY TO WIFE — DAMAGES. — Action for loss of service. While attempting to enter a car of the defendants, the plaintiff's wife was injured through the negligence of the guard in closing the gate upon her. She had been pregnant for a few weeks, and, as a result of the injury, miscarried. *Held* (reversing the decision of the court below), that plaintiff cannot recover damages for the loss of prospective offspring. *Butler* v. *Manhattan, &c. R. R.*, 38 N. E. Rep. 454 (N. Y.).

As is pointed out at common law, the death of a person, caused by the negligence of another, gave no right of action for damages to the kindred of the deceased. This was changed in England by the statute known as Lord Campbell's Act, the provisions of which were adopted in New York (Laws, 1847, c. 450, and Laws, 1849, c. 256) and in other States. Under it, actions may be maintained for the death of infant children for the benefit of their parents, the basis of damage being the supposed pecuniary value to the parents of the infant's life. *Birkett* v. *Ice Co.*, 100 N. Y. 504, and cases cited. To ascertain such value is, in great degree, a matter of speculation and conjecture, yet the law permits juries to determine it. They have some slight aids, however, the facts of the age, sex, and health of the child, its grade of intelligence, &c. These are lacking in the case of a child unborn, and the court refuse to extend the law to include cases of this nature. No authorities are cited for the position taken, but the decision seems sound.

TORTS — INSANITY — ACTION FOR NEGLIGENCE. — While temporarily insane, the master of a vessel, whose rudder was broken so that she could not be steered, allowed the vessel to drift ashore, refusing the proffered assistance of two tugs, and making no attempt to save her, whereby she became a total wreck. In an action against the master for negligence in the management of the vessel, it was *held* that such insanity not having been caused by defendant's efforts to save the vessel, was no defence. (Peckham, Gray, and O'Brien, JJ., dissenting.) *Williams* v. *Hays*, 38 N. E. Rep. 449 (N. Y.).

It is difficult to see upon what grounds the dissenting judges went, — their opinions are not reported, — for it is almost too well settled to admit of argument that an insane person is liable for his torts, whether of misfeasance or of non-feasance. See the exhaustive collection of cases and text-writers cited in the opinion. In Wharton on Negligence, § 88, it is stated that lunatics cannot be held responsible for any greater degree of care than they possess, but as is pointed out in Shearman and Redfield on Negligence, the authorities cited there are either cases of contributory negligence or dicta from the Roman law.